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HOW CALIFORNIA GOVERNS THE NEWS MEDIA

Jon H. Sylvester*

While California legislation is generally regarded as progressive, it is not immediately clear what "progressive" means when such democratic values as the right to information and the right to privacy conflict. This article surveys how certain state laws impact the operations of the print and broadcast news media.

On the national scene, controversies such as the highly-publicized defamation suits of General William Westmoreland and former Israel Defense Minister Ariel Sharon have prompted debate, discussion and analysis which have focused, inevitably, on the first amendment to the United States Constitution. Most legal battles involving the press, however, achieve neither national publicity nor constitutional proportions. Although state laws affecting the news media must, when challenged, meet the requirements of the first amendment, it remains a practical reality that state laws govern a wide range of day-to-day media operations.

Laws affecting the media include a number of traditional subject areas, including constitutional law, torts, evidence, and civil, criminal and administrative procedure. The topics discussed herein are defamation, invasion of privacy, cameras in the courtroom, shield law (or "reporter's privilege"), publication of recorded conversations and pilfered documents, and legislation regarding open meetings and open records.

I. DEFAMATION

California has several legislative provisions that concern defamation (or, more specifically, slander and libel), as well as several provisions that directly concern newspapers, radio and television.¹ State policy dictates that the media be afforded its constitutional right to inform the public of controversies surrounding sensitive is-

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1. CAL. CIV. CODE §§ 45, 47, 48, 3425.1 (West 1985).

sues of public interest.²

California allows media members a qualified privilege pursuant to law first enunciated in *New York Times v. Sullivan*.³ When a public official brings an action for defamation against a media defendant, he must allege and prove that the publication was made with "actual malice."⁴ Actual malice is defined as "knowledge that [the publication] was false or . . . reckless disregard of whether it was false or not."⁵ The term "public official" was defined in *New York Times*, and was later expanded to include "public figures" in *Curtis Publishing Co. v. Butts*.⁶

In *Gertz v. Robert Welch, Inc.*, the court recognized two classifications of public figures: 1) "persons who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,"⁷ or who by reason of their fame, shape events in areas of concern to society at large;⁸ and 2) persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of issues involved."⁹

In California, courts have interpreted the definition of public figure, as defined in *Gertz*, to further require that "the [complainant] must have voluntarily and actively sought, in connection with any given matter of public interest, to influence the resolution of the issues involved,"¹⁰ and his position "must be one which would invite public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."¹¹ The latter requirement is termed the "public controversy test."¹² Thus, members of the California media must cope with a more restrictive definition of "public figure" than that of the United States Supreme Court.

California courts have, however, endorsed the basic standard

2. *Weingarten v. Block*, 102 Cal. App. 3d 129, 148-49, 162 Cal. Rptr. 707, 714-15 (1980).

3. 376 U.S. 254 (1966).

4. *Id.* at 280.

5. *Id.* See also *Fisher v. Larson*, 138 Cal. App. 3d 627, 634, 188 Cal. Rptr. 216, 222 (1982); *Weingarten*, 102 Cal. App. 3d at 133, 162 Cal. Rptr. at 705.

6. 388 U.S. 130 (1967).

7. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

8. *Id.* at 345 (1974) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967)).

9. 418 U.S. at 345.

10. *Franklin v. Benevolent & Protective Order of the Elks*, 97 Cal. App. 3d 915, 927, 159 Cal. Rptr. 131, 140 (1979).

11. *Rancho La Costa, Inc. v. Superior Court, County of Los Angeles*, 106 Cal. App. 3d 646, 658-59, 165 Cal. Rptr. 347, 355 (1980).

12. *Id.* at 660, 165 Cal. Rptr. at 356.

enunciated in *New York Times v. Sullivan*. Under California law, a public figure or official in a civil defamation action against a newspaper must show clear and convincing evidence that the allegedly libelous publication was published with knowledge that it was false or with a reckless disregard for the truth.¹³

Generally, all who take a responsible part in a publication are liable for any defamation that results from the publication.¹⁴ But the mere fact that oral defamation is subsequently quoted or printed in a newspaper does not render it libelous.¹⁵ One may not be held liable for republication of a statement unless the original statement is found to be defamatory.¹⁶ In *Osmond v. EWAP, Inc.*,¹⁷ the court refused to impose liability for the mere dissemination of libelous material published by another on a showing that there was no reason to believe that the publication was libelous. In *Osmond*, the manager of a newspaper had no knowledge of the preparation or content of the article he published which contained the libelous matter, and he did not control the editorial staff.¹⁸ Liability is imposed upon one who delivers or transmits defamatory material published by another only "if he knows or has reason to know of its defamatory character."¹⁹ This rule protects vendors of books, magazines and newspapers.²⁰

A. *Statutory Defamation Provisions Relating to the Media*

Both California's criminal and civil codes contain statutory provisions that specifically cover the media.²¹ Under the civil provisions, a person who alleges libel by a newspaper or slander by a radio broadcast may recover only special damages. Special damages are those that the plaintiff alleges and proves that he has suffered with respect to his property, business, trade, profession or occupation, including such amounts as the plaintiff alleges and proves he has ex-

13. *Belli v. Curtiss Publishing Co.*, 25 Cal. App. 3d 384, 396, 102 Cal. Rptr. 122, 133 (1972).

14. *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852, 200 Cal. Rptr. 674, 679 (1984).

15. *Mercado v. Hoefler*, 190 Cal. App. 2d 12, 13, 11 Cal. Rptr. 787, 791 (1961) (citing *Oberkotter v. Woolman*, 187 Cal. 500, 505 (1921)).

16. *Montandon v. Cox Broadcasting Corp.*, 45 Cal. App. 3d 932, 935, 120 Cal. Rptr. 196, 197 (1975).

17. 153 Cal. App. 3d at 852, 200 Cal. Rptr. at 680.

18. *Id.*

19. *Id.* at 853, 200 Cal. Rptr. at 680.

20. *Id.*

21. CAL. CIV. CODE §§ 45, 47, 48, 3425.1 (West 1982).

pending as a result of the alleged libel and no other.²² However, if a person demands a retraction within twenty days after he receives knowledge of a publication or broadcast of an alleged libel or slander and a retraction is not given, the complainant may recover general and special damages.²³ Exemplary damages may be also recovered, if the plaintiff alleges and proves that the publication or broadcast was made with actual malice. This finding is within the discretion of the court or jury, and actual malice may not be presumed or inferred.²⁴ This section does not protect magazines.²⁵

Members of the media have a conditional privilege under Civil Code section 47 to make a true and fair report of a judicial, legislative or other official public proceeding and anything "said in such proceeding, or of a verified charge or complaint by any person to a public official, upon which complaint a warrant shall have been issued."²⁶ Civil Code section 47(5) provides an absolute privilege for the fair and true report of the proceedings of a lawful, public meeting or the publication of the matter published "for the public benefit."²⁷ Additionally, under Civil Code section 47(3), the media may claim a conditional privilege for a defamatory publication if the communication is made, without malice, to an interested person or to a person so related to such person as to "afford a reasonable ground for supposing the motive for the communication innocent" or who is requested by the person interested to give the information.²⁸ This section does not protect newspapers and magazines however, when the publication was made merely because "it relates to a matter which may have general public interest."²⁹

Actions against California media are also limited by the Uniform Single Publication Act. This act precludes a person from bringing more than

one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or

22. CAL. CIV. CODE § 48a(4)(b) (West 1982).

23. CAL. CIV. CODE § 48a(1) (West 1982).

24. CAL. CIV. CODE § 48a(2) (West 1982).

25. *Montandon v. Triangle Publications*, 45 Cal. App. 3d 938, 953, 120 Cal. Rptr. 186, 195 (1975).

26. CAL. CIV. CODE § 47(4) (West 1982).

27. CAL. CIV. CODE § 47(5) (West 1982).

28. CAL. CIV. CODE § 47(3) (West 1982).

29. *Rancho La Costa, Inc. v. Superior Ct., Cty. of Los Angeles*, 106 Cal. App. 3d 646, 664, 165 Cal. Rptr. 347, 358-59 (1980).

any one broadcast over radio or television or any one exhibition of a motion picture.³⁰

Under the Act, a "publication of an integrated issue of a mass media writing occurs upon the first general distribution of the material to the public."³¹ This date is set as the earliest date on which the allegedly defamatory information is "substantially and effectively communicated to a meaningful mass of readers."³²

B. *Libel*

The California codes include statutory provisions for both civil and criminal libel. Civil libel is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."³³ Criminal libel is defined as:

a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.³⁴

Civil libel liability is imposed when a publication contains a false statement of fact³⁵ and is unprivileged.³⁶ If a newspaper is involved, the publication must be examined in the context of the article in which it is included; the statement is not considered alone.³⁷ In addition, the person defamed must be ascertainable from the publication, although the actual name of the person need not be published.³⁸

30. CAL. CIV. CODE § 3425.1 (West 1985).

31. *Strick v. Superior Court*, County of Los Angeles, 143 Cal. App. 3d 916, 922, 192 Cal. Rptr. 314, 317 (1983).

32. *Id.* (quoting *Osmers v. Parade Publications*, 234 F. Supp. 924, 927 (S.D.N.Y. 1964)).

33. CAL. CIV. CODE § 45 (West 1982).

34. CAL. PENAL CODE § 248 (West 1970).

35. *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 600, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976).

36. *Freeman v. Mills*, 97 Cal. App. 2d 161, 217 P.2d 687, 691 (1950).

37. *Jeffers v. Screen Extras Guild, Inc.*, 162 Cal. App. 2d 717, 727-28, 328 P.2d 1030, 1037 (1958), *disapproved on other grnds.*, *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 551, 343 P.2d 36, 44 (1959).

38. *DiGiorgio Fruit Corp. v. American Federation of Labor & Congress of Indus. Organizations*, 215 Cal. App. 2d 560, 30 Cal. Rptr. 350, 355 (1963).

Malice must be shown to sustain a civil libel action.³⁹ Malice is presumed when the publication is libelous per se.⁴⁰ Libel on its face, or libel per se, is a "libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact."⁴¹ Malice is never presumed unless the publication is actionable as libel per se.⁴² The falsity of the publication may be admissible as evidence of malice, but such evidence is not necessarily conclusive on this point.⁴³

A publication must be malicious to support an action for criminal libel.⁴⁴ Malice is presumed if no "justifiable motive" is shown for the publication.⁴⁵ Criminal libel is punishable by imprisonment or fine.⁴⁶ The publication need not be read or seen by another to support a criminal libel charge.⁴⁷ All that is required is that the "accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself."⁴⁸ However, the communication is privileged and presumed not to be malicious if it is made to a person interested in the communication or if it is made by one who stood in such a relation to the person interested in the communication as to afford reasonable grounds to believe that his motive was innocent.⁴⁹ Truth is admissible as evidence in a criminal libel case, and the defendant will be acquitted if the trier of fact finds that the matter charged as libelous is true and was published with good motives and for justifiable ends.⁵⁰

C. Slander

As with libel, California's slander law includes both criminal and civil statutes. Civil slander is defined as follows:

39. *Good Gov't Group of Seal Beach, Inc. v. Superior Court of Los Angeles Cty.*, 22 Cal. 3d 672, 680, 586 P.2d 572, 575, 150 Cal. Rptr. 258, 261 (1978), *cert. denied*, 441 U.S. 961 (1979).

40. *Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 289, 38 P. 903 (1894).

41. CAL. CIV. CODE § 45a (West 1982).

42. *Lewis v. Hayes*, 165 Cal. 527, 533, 132 P. 1022, 1024 (1913).

43. *Freeman v. Mills*, 97 Cal. App. 2d at 168, 217 P.2d at 692 (1950).

44. CAL. PENAL CODE § 248 (West 1970).

45. CAL. PENAL CODE § 250 (West 1970).

46. CAL. PENAL CODE § 249 (West 1970).

47. CAL. PENAL CODE § 252 (West 1970).

48. *Id.*

49. CAL. PENAL CODE § 256 (West 1970).

50. CAL. PENAL CODE § 251 (West 1970).

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any such or other means which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime;
2. Imputes in him the present existence of an infectious, contagious or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotency or a want of chastity;
5. Which, by natural consequences, causes actual damages.⁵¹

Criminal slander is defined as follows:

Slander is a malicious defamation, orally uttered whether or not it be communicated through or by radio or any mechanical or other means or device, whatsoever, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or disclose the actual or alleged defects of one who is living, or of any educational, literary, social, fraternal, benevolent or religious corporation, association or organization, and thereby to expose him or it to public hatred or ridicule.⁵²

Unlike the civil slander provision, the criminal provision requires that the person utter the slander "willfully and with malicious intent."⁵³ A person found guilty under Penal Code section 258 is subject to fine and/or imprisonment. "Words uttered in the proper discharge of an official duty, or in any legislative or judicial proceeding or in any other official proceeding authorized by law, shall be privileged and . . . never . . . deemed a slander. . . ."⁵⁴

The utterance of a slanderous statement is presumed to be malicious, unless the communication was made to an "interested person" or was made by someone who stands in such a relation to such interested person that reasonable grounds exist for believing the utterance is innocent.⁵⁵ As with libel, truth is admissible as evidence and the

51. CAL. CIV. CODE § 46 (West 1982).

52. CAL. PENAL CODE § 258 (West 1970).

53. *Id.*

54. *Id.*

55. CAL. PENAL CODE § 259 (West 1970).

defendant is acquitted if it appears that the utterance was made with justifiable ends and nonmalicious motives.⁵⁶

Whether a statement constitutes slander is determined in light of all of the circumstances that surround its publication.⁵⁷ A slanderous statement must be made with malice, which means "actual or express malice, hatred or ill will . . . beyond normal feelings toward a wrongdoer."⁵⁸

Defamation by radio or television broadcast is also considered slander in California.⁵⁹ Furthermore, a cause of action for slander per se will lie when a

false and unprivileged communication by radio which tends directly to injure a person "in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits."⁶⁰

The radio broadcast should be considered in its entirety to determine whether or not the communication is slanderous.⁶¹ California Civil Code section 48.5 precludes the imposition of liability upon the owner, licensee or operator of a television or radio broadcasting station or agents or employees of such persons, for broadcast of slanderous statements by someone other than these persons.⁶² If someone other than these persons utters the slanderous remarks, that person alone is liable for any damages for any such defamatory statement.⁶³

II. INVASION OF PRIVACY

The right of privacy is now protected by the California Constitution.⁶⁴ Previously, only the common law recognized this right.

California common law recognizes four kinds of invasions of privacy. They are: 1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plain-

56. CAL. PENAL CODE § 260 (West 1970).

57. *Arno v. Stewart*, 245 Cal. App. 2d 955, 961, 54 Cal. Rptr. 392, 396 (1966).

58. *Lagies v. Copley*, 110 Cal. App. 3d 958, 969, 168 Cal. Rptr. 368, 374 (1980).

59. *Arno*, 245 Cal. App. 2d at 961, 54 Cal. Rptr. at 396.

60. *Correia v. Santos*, 191 Cal. App. 2d 844, 850-51, 13 Cal. Rptr. 132, 135 (1961).

61. *Id.*

62. CAL. CIV. CODE § 48.5 (West 1982).

63. *Id.*

64. CAL. CONST. art. 1, § 1 (West 1974).

tiff in a false light in the public eye; and 4) appropriation for the defendant's advantage of the plaintiff's name or likeness.⁶⁵

Case law further clarifies the interpretation of each kind of invasion of privacy. In order for a person to recover for "public disclosure of private facts, the disclosure must be public in the sense that it is communicated to the public in general, or to a large number of persons."⁶⁶ The facts must be private, and not public knowledge, and those facts made public must be such that would be "offensive and objectionable to a reasonable person of ordinary sensibilities."⁶⁷ In addition, the facts must be "an unwarranted publication of intimate details of one's private life which are outside the realm of legitimate public interest."⁶⁸

If the defendant is a member of the media and the plaintiff is a public figure, the plaintiff must satisfy the requirement of actual malice, as enunciated in *New York Times v. Sullivan*,⁶⁹ in order to recover for false light invasion of privacy. However, if the plaintiff is a private citizen, the standard for liability is "less than actual malice short of liability without fault."⁷⁰ The standard for liability is higher in a false light action because this kind of privacy invasion is considered equivalent to defamation.⁷¹

California has no statutory provisions for false light or "public disclosure of private facts;" however, Civil Code section 48(a)⁷² is applicable to a false light invasion of privacy claim if the defendant is a member of the media.⁷³

Common law liability for appropriation of a person's likeness or name requires: 1) the defendant to use the plaintiff's name or likeness to the defendant's advantage commercially or otherwise; 2) the lack of plaintiff's consent; and 3) a resulting injury.⁷⁴ California

65. *Eastwood v. Superior Court of Los Angeles County*, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 346 (1983); *see also* *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 603 P.2d 425, 429, 160 Cal. Rptr. 323, 326 (1979); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839, 841, (1976); *Johnson v. Harcourt, Brace & Jovanovich*, 43 Cal. App. 3d 880, 887, 118 Cal. Rptr. 370, 375 (1974).

66. *Porten*, 64 Cal. 3d at 828, 134 Cal. Rptr. at 841.

67. *Sipple v. The Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1045, 201 Cal. Rptr. 665, 667-68 (1984).

68. *Id.* at 1047, 201 Cal. Rptr. at 669.

69. 376 U.S. 254 (1966).

70. *Eastwood*, 149 Cal. App. 3d at 424, 198 Cal. Rptr. at 351.

71. *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 543, 483 P.2d 34, 44, 93 Cal. Rptr. 866, 876 (1971).

72. CAL. CIV. CODE § 48(a) (West 1982).

73. *Johnson v. Harcourt, Brace, Jovanovich*, 43 Cal. App. 3d 880, 893, 118 Cal. Rptr. 370, 380 (1974).

74. *Eastwood*, 149 Cal. App. 3d at 417, 198 Cal. Rptr. at 437.

also has statutory provisions covering commercial appropriation invasion of privacy.⁷⁵

In addition to the requirements set forth above, case law requires that the defendant knowingly use the plaintiff's name, photograph or likeness for the purpose of advertising or solicitation of purchases. Moreover, there must be a direct connection between the use and the commercial purpose.⁷⁶

No case law has interpreted Civil Code section 990, which was added in 1984. However, *Lugosi v. Universal Pictures*,⁷⁷ a pre-section 990 case, involved a section 990 issue. The action was brought by Bela Lugosi's descendants. The court ruled that the action could not be maintained because the right to privacy was a personal right and did not survive Lugosi's death.⁷⁸ *Lugosi* would probably have been decided differently under Civil Code section 990 because that section permits damages to be recovered for commercial appropriation of a deceased person's name, voice, signature, photograph, or likeness.⁷⁹

III. CAMERAS IN THE COURTROOM

California has not followed an emerging trend toward allowing all types of cameras in courtrooms during judicial proceedings. In 1978, California Rules of Court rule 980 was enacted on an experimental basis. The rule was permanently enacted in 1984.⁸⁰

Under Rule 980, members of the media are allowed to broadcast or record court proceedings only upon a written court order.⁸¹ Media access to photograph, record, or broadcast court proceedings is available only at the absolute discretion of the trial judge.⁸² The trial judge has the power, in the interest of justice and to protect the rights of the parties, to refuse such media access to the courts.⁸³

Rule 980 prohibits film or electronic media coverage of closed proceedings, in-chambers proceedings, and jury selection.⁸⁴ Coverage of attorney-client conferences and bench conferences is also prohib-

75. CAL. CIV. CODE §§ 990, 3344 (West Supp. 1985).

76. *Eastwood*, 149 Cal. App. 3d at 417-18, 198 Cal. Rptr. at 347; see also *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d at 895, 118 Cal. Rptr. at 381 (1974).

77. 25 Cal 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

78. *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

79. CAL. CIV. CODE § 990 (West Supp. 1985).

80. CAL. R. CT. 980 (1984).

81. CAL. R. CT. 980(b) (1984).

82. *Id.*

83. *Id.*

84. CAL. R. CT. 980(b)(2) (1984).

ited.⁸⁵ Additionally, the court can restrict the type of equipment it will permit into the courtroom even after an order has been granted allowing media coverage.⁸⁶ No film or electronic media coverage is permitted which is not included in the court's order.⁸⁷ The key issue in the area of film and video coverage of courtroom proceedings is a proper balancing of the right of the press and public's right to know, against the right of the defendant to a fair trial, unfettered by potentially prejudicial publicity.⁸⁸ This issue arises both in regard to cameras in the courtroom and when the media's general right of access to courtroom proceedings is challenged.⁸⁹

The courts have consistently restricted general media access to the courts on the theory that the press has no greater right of access than the general public.⁹⁰ The media have no constitutional right of access to preliminary proceedings in California, such as voir dire and preliminary hearings.⁹¹ This is so despite California common law which assures a defendant a right to a public preliminary hearing.⁹²

This common law rule is specifically excepted by Penal Code section 868,⁹³ which requires the preliminary examination to be open and public, but gives the defendant the right to request closure.⁹⁴ Before closure is granted, Penal Code section 868 requires a magistrate to find that closure is necessary in order to protect the defendant's right to a fair and impartial trial.⁹⁵

Moreover, case law has interpreted Penal Code section 868 to require an overriding interest supported by adequate findings that closure is necessary to preserve that interest⁹⁶ before such closure is granted.

Although the media is afforded a right of access under section 868 and Rule 980, that access is severely restricted. The permanent

85. *Id.*

86. CAL. R. CT. 980(b)(3) (1984).

87. CAL. R. CT. 980(d) (1984).

88. *San Jose Mercury News v. The Mun. Ct. for the Sunnyvale Cupertino Dist. of Santa Clara Cty.*, 30 Cal. 3d 498, 502-03, 638 P.2d 655, 657, 179 Cal. Rptr. 772, 774 (1982).

89. *Press-Enterprise Co. v. Superior Court (Diaz)*, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360, 366 (1984).

90. *San Jose Mercury News*, 30 Cal. 3d at 503, 638 P.2d at 655, 179 Cal. Rptr. at 774.

91. *Id.* at 508, 638 P.2d at 660-61, 179 Cal. Rptr. at 778.

92. *People v. Pompa-Ortiz*, 27 Cal. 3d 519, 524-26, 612 P.2d 941, 943-45, 165 Cal. Rptr. 851, 853-54 (1980).

93. CAL. PENAL CODE § 868 (West 1985).

94. *Id.*

95. *Id.*

96. *See Press Enterprise Co. v. Superior Court*, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984).

enactment of Rule 980 suggests that no change is likely in the near future regarding cameras in the courtroom, despite the trend in other states and the United States Supreme Court toward allowing electronic and film media access to courtrooms. The above-mentioned California statutes adamantly protect a defendant's right to a fair trial—even at the expense of public access through media coverage.

IV. SHIELD LAW

In 1980, the California Legislature amended the state constitution to grant the news media a qualified right to refuse to disclose their sources of information.⁹⁷ Under this provision, a member of the news media can rarely be cited for contempt of court for failing to reveal a news source.⁹⁸ This right was first codified in 1872 under Civil Code section 1881(b)⁹⁹ and later was codified under current Evidence Code section 1070.¹⁰⁰

Both of these provisions seek to facilitate the free flow of information as required by the first amendment freedom of the press.¹⁰¹ However, article 1, section 2 of the state constitution and Evidence Code section 1070 protect members of the news media only against contempt citations for failure to disclose sources of information. The provisions do not insulate the media from other court sanctions.¹⁰²

The first amendment does not protect the press from criminal sanctions.¹⁰³ Nor are members of the media privileged to identify court officers or those subject to court orders or the court's control.¹⁰⁴ However, members of the media are protected from revealing all other sources.¹⁰⁵

The right to a fair trial may outweigh a press privilege against discovery.¹⁰⁶ In general, neither of these rights is superior to the other. When a conflict arises, however, each must be balanced

97. CAL. CONST. art. I, § 2(b) (1980).

98. *Id.*

99. CAL. CIV. PROC. CODE § 1881(b) (West 1965), *recodified at* CAL. EVID. CODE § 1070 (West Supp. 1986).

100. CAL. EVID. CODE § 1070 (West Supp. 1985).

101. *CBS, Inc. v. Superior Court of Santa Clara County*, 85 Cal. App. 3d 241, 251, 149 Cal. Rptr. 421, 427 (1978).

102. *See Rosato v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427, *cert. denied*, 427 U.S. 912 (1975). *See also* Comment, *California's "New" News-men's Shield Law and the Criminal Defendant's Right to a Fair Trial*, 26 SANTA CLARA L. REV. 219 (1986).

103. *Id.* at 218, 124 Cal. Rptr. at 446.

104. *Id.* at 224, 124 Cal. Rptr. at 450.

105. *Id.*

106. *CBS, Inc.*, 85 Cal. App. 3d at 251-52, 149 Cal. Rptr. at 427.

against the other with the aim of mutual accommodation and minimum interference.¹⁰⁷ No privilege exists if the source at issue has already been exposed to the public.¹⁰⁸ Additionally, no privilege exists to conceal a source demanded by court order.¹⁰⁹

Evidence Code section 1070 only applies to unpublished information, which is "information not disseminated to the public by the person from whom disclosure is sought."¹¹⁰ In addition, the section only applies to news or news commentary given by a reporter who is a member of the television or radio news media.¹¹¹

The statute does not explain what type of information is considered news. However, case law defines "news" as "a report of a recent event, intelligence, or information about some person or thing."¹¹² Only truth qualifies as news.¹¹³ Neither case law, nor the statute explains why information received by personnel of magazines, newspapers, and other periodicals does not constitute news.

V. PUBLICATION OF PILFERED DOCUMENTS

In the area of pilfered documents, two key questions are raised: 1) whether the publication of pilfered documents involves receipt of stolen property by the publisher in addition to a possible invasion of privacy tort, and 2) whether there is an increased penalty for receipt of pilfered government documents and/or a presumption of theft or knowing receipt of these documents by the publisher. No statutory provisions directly address these issues; however, liability for invasion of privacy and/or criminal penalties may be imposed upon a person who pilfers either non-government or government documents. Additionally, a person unauthorized to receive these documents may be liable whether the documents were either pilfered or lawfully obtained.

As mentioned above in Section II, Penal Code section 631(a) sanctions could be imposed upon one who uses or attempts to use information obtained through illegal wiretapping.¹¹⁴ This provision may be applicable to media members who attempt to, or who do publish or broadcast information obtained in this manner. Moreover,

107. *Id.* at 252, 149 Cal. Rptr. at 427.

108. *Id.* at 250, 149 Cal. Rptr. at 426.

109. *Id.* at 251, n.2, 149 Cal. Rptr. at 426, n.2.

110. CAL. EVID. CODE § 1070(c) (West Supp. 1985).

111. CAL. EVID. CODE § 1070(b) (West Supp. 1985).

112. *Werner v. Southern Cal. Assoc. Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950).

113. *Id.*

114. CAL. PENAL CODE § 631(a) (West 1985).

because Penal Code section 631 and the criminal invasion of privacy statutes do not appear to be limited to privacy invasions of private citizens, these provisions could likewise be used when government documents are unlawfully obtained.

In addition, members of the media who make unauthorized and willful disclosure of the contents, or part of the contents of a telegraphic, or telephonic communication, may be punished under Penal Code section 637.¹¹⁵ Likewise, the unauthorized procurement or opening of mail addressed to another which contains a telegraphic or telephonic message, with the intent to use the contents thereof, is punishable.¹¹⁶ As mentioned previously, a similar civil action may be maintained under Penal Code section 637.2.¹¹⁷

With regard to government documents, Penal Code section 11143 makes a misdemeanor the receipt of criminal records or information from such a record, by an unauthorized person. However, this statute specifically excepts persons protected by the media shield law or Evidence Code section 1070. In *McCall v. Oroville Mercury Co.*,¹¹⁸ the plaintiff argued that Penal Code section 11143 was applicable to members of the media. In that case, a newspaper obtained from the Department of Justice and published the criminal record of an elected official. The plaintiff contended that the records were unlawfully obtained pursuant to section 11143. The court held that section 11143 exempted all members of the news media and not just those who were subject to contempt citations for failure to disclose sources of information.¹¹⁹

Case law in the area of publication of pilfered documents is scant when wiretapping, eavesdropping, or any other form of unauthorized taking is involved. However, *People v. Kunkin*¹²⁰ addressed the question of whether the publication of stolen government documents necessarily subsumed the receipt of stolen property. The court held that sufficient evidence existed to show that the documents had been stolen, but not enough evidence was produced to infer that the publisher knew, or should have known that the documents were stolen.¹²¹ Presumably, then, a publisher who knew or should have

115. CAL. PENAL CODE § 637 (West 1985).

116. CAL. PENAL CODE § 637.1 (West 1985).

117. CAL. PENAL CODE § 637.2 (West 1985).

118. *McCall v. Oroville Mercury Co., Inc.*, 142 Cal. App. 3d 805, 191 Cal. Rptr. 280 (1983).

119. *Id.* at 808, 191 Cal. Rptr. at 283.

120. *People v. Kunkin*, 9 Cal. 3d 245, 507 P.2d 1392, 107 Cal. Rptr. 184 (1973).

121. *Id.* at 255-56.

known that the documents were stolen could be prosecuted for receipt of stolen goods under *Kunkin*.¹²² An invasion of privacy issue was not raised in the case, but it may be assumed that such an action would lie when the publication of the document would invade the privacy of a person mentioned or referred to in the publication.

VI. OPEN MEETING LEGISLATION

California public policy dictates that state bodies, public agencies and legislative bodies of local agencies must conduct their meetings openly and in public so that the public can remain informed.¹²³ This is a requirement of the Bagley-Keene Act¹²⁴ as well as of the Brown Act.¹²⁵

These statutory provisions specifically exempt certain meetings. Section 11126 permits closed sessions in a number of situations, including: meetings to consider appointment, employment or dismissal of public employees; examination of licenses; administrative adjudications; and consideration of national security issues.¹²⁶

Under the Bagley-Keene Act, a "state body" is defined as "every state board or commission, or similar multimember body of the state which is required by law to conduct official meetings and every commission created by executive order," not including, inter alia, meetings required to be open under the Brown Act and certain state agencies under California Constitution article VI.¹²⁷ This definition includes "any board, commission, committee or any similar multimember body which exercises any authority of a state body delegated to it by that state body,"¹²⁸ or "on which a member of a body which is a state body . . . serves in his or her official representative capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body."¹²⁹ The term "state body" also includes advisory bodies consisting of three or more persons (boards, committees, commissions, or subcommittees) which are created by formal action of a state body or a member of the state body.¹³⁰

122. *Id.*

123. CAL. GOV'T CODE §§ 54953 (West 1983) & 11120 (West Supp. 1986).

124. CAL. GOV'T CODE §§ 11120-11130.7 (West 1981).

125. CAL. GOV'T CODE §§ 54950-54959 (West 1983).

126. CAL. GOV'T CODE § 11126 (West Supp. 1986).

127. CAL. GOV'T CODE § 11121 (West Supp. 1986).

128. CAL. GOV'T CODE § 11121.2 (West Supp. 1986).

129. CAL. GOV'T CODE § 11121.7 (West Supp. 1986).

130. CAL. GOV'T CODE § 11121.8 (West Supp. 1986).

Persons who attend meetings under the Bagley-Keene Act are not required to register their names or to fulfill any other conditions to attend such meetings. Attendance lists or other similar documents circulated during public meetings must indicate that signing the list or document is completely voluntary.¹³¹ Meetings required to be public must be open to all persons who wish to attend.¹³² Also, the members of the public may request to be notified of a meeting at least ten days in advance,¹³³ and the notice shall include an agenda of the meeting.¹³⁴ Furthermore, when an emergency session is called, an agenda of that session is to be made available to the public.¹³⁵ A member of a state body who attends a meeting in violation of the Bagley-Keene Act, with knowledge that the meeting is held in violation of the Act, is guilty of a misdemeanor.¹³⁶

The Brown Act permits closed sessions, when legislative bodies of local agencies meet with law enforcement officers to discuss possible threats to the security of, or access to, public buildings,¹³⁷ and when license applications are issued.¹³⁸ The Act also permits the exclusion, during the examination of a witness, of other witnesses in the same investigative matter.¹³⁹

Like the Bagley-Keene Act, the Brown Act provides that a person attending a public meeting is not required to meet any conditions, such as registration, or completion of a questionnaire.¹⁴⁰ Any person is allowed to tape the proceedings of an open and public session, provided such action does not disrupt the meeting.¹⁴¹ The legislative body of a local agency is to provide in its by-laws or by resolution, a time and place for its regular meetings.¹⁴² A notice of each regular meeting must be mailed, at least one week before such meeting, to each person within the district who has filed a written request for such notice with the legislative body at issue.¹⁴³ Meetings may be continued by order or notice of continuance, provided that notice of

131. CAL. GOV'T CODE § 11124 (West Supp. 1986).

132. CAL. GOV'T CODE § 11123 (West Supp. 1986).

133. CAL. GOV'T CODE § 11125(a) (West Supp. 1986).

134. CAL. GOV'T CODE § 11125(b) (West Supp. 1986).

135. CAL. GOV'T CODE § 11125(g) (West Supp. 1986).

136. CAL. GOV'T CODE § 11130.7 (West Supp. 1986).

137. CAL. GOV'T CODE § 54957 (West 1983).

138. CAL. GOV'T CODE § 54956.7 (West 1983).

139. CAL. GOV'T CODE § 54957 (West 1983).

140. CAL. GOV'T CODE § 54953.3 (West 1983).

141. CAL. GOV'T CODE § 54953.5 (West 1983).

142. CAL. GOV'T CODE § 54954 (West 1983).

143. CAL. GOV'T CODE § 54954.1 (West 1983).

such continuance is conspicuously posted.¹⁴⁴

The exceptions of the acts are to be narrowly construed, so as to favor disclosure and the intent of the Legislature to keep the public informed of the functions of governmental and public agencies.¹⁴⁵

In *San Diego Union v. City Council of City of San Diego*, a case involving the Brown Act, the court held that city council sessions at which salaries of nonelected city officers or employees are discussed may be closed to the public.¹⁴⁶ However, council sessions to discuss the amount of a salary increase for a specific individual must be open to the public.¹⁴⁷ Minutes of a meeting held in violation of the Brown Act are subject to disclosure.¹⁴⁸

VII. OPEN RECORDS LEGISLATION

The Public Records Act of 1968¹⁴⁹ was enacted to curb governmental secrecy and to ensure individual privacy.¹⁵⁰ The Legislative Open Records Act,¹⁵¹ and the Public Records Act declare that "access to information concerning the conduct of the people's business by the Legislature is a fundamental and necessary right of every citizen."¹⁵² As a result of California's policy favoring the disclosure of public records, the exceptions to the Public Records Act are to be narrowly construed so as to give effect to the legislative intent to curtail governmental secrecy.¹⁵³

The primary issue under the Public Records Act is whether the records are "public records." "Public records," as defined by the statute, include "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."¹⁵⁴

144. CAL. GOV'T CODE § 54955.1 (West 1983).

145. *Register Div. of Freedom Newspaper v. Orange City*, 158 Cal. App. 3d 893, 907-08, 205 Cal. Rptr. 92, 100 (1984); *San Diego Union v. City Council of City of San Diego*, 146 Cal. App. 3d 947, 955, 196 Cal. Rptr. 45, 49 (1983).

146. *San Diego Union*, 146 Cal. App. 3d at 955, 196 Cal. Rptr. at 50.

147. *Id.* at 956, 196 Cal. Rptr. at 50.

148. *Register Div. of Freedom Newspaper*, 158 Cal. App. 3d at 907, 205 Cal. Rptr. at 101.

149. CAL. GOV'T CODE §§ 6250-6626 (West 1983).

150. *Register Div. of Freedom Newspaper*, 158 Cal. App. 3d at 902, 205 Cal. Rptr. at 97; *see also* *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 766, 772, 192 Cal. Rptr. 415, 420 (1983).

151. CAL. GOV'T CODE § 9070 (West 1980).

152. CAL. GOV'T CODE §§ 6250 (West 1983) & 9070 (West 1980).

153. *San Gabriel Tribune*, 143 Cal. App. 3d at 779, 192 Cal. Rptr. at 426.

154. CAL. GOV'T CODE § 6252(d) (West 1983).

This definition, as further expanded by case law, covers "every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record keeping instrument as it is developed. Only purely personal information unrelated to the 'conduct of the public's business' is exempt."¹⁵⁵

The Act specifies which agencies must provide written guidelines on the accessibility of such records,¹⁵⁶ which records are public,¹⁵⁷ and which records are exempted.¹⁵⁸

Even though the Public Records Act does not specifically cover court records, such records are considered public and are available for inspection by the public, including the news media, unless a specific exception exists for making such records nonpublic.¹⁵⁹ However, a court may not grant to the media a greater right of access to its records than it grants to the general public. The court can temporarily restrict access to its records upon a showing of good cause.¹⁶⁰ *In re Estate of Hearst* states, in dictum, that no unrestrained right of the news media to gather information exists merely because the news media has the right to publish such information.¹⁶¹

As under both the Brown Act and the Bagley-Keene Act, competing interests must be balanced when disclosure is sought under the Public Records Act. The courts seek to balance the public's right of access to information against both the government's need to preserve secrecy and the individual's right to privacy.¹⁶² A public official may withhold disclosure when the public interest in nondisclosure outweighs the public interest in disclosure.¹⁶³ In each case, a court has the duty to weigh the benefits and costs of disclosure.¹⁶⁴

The Public Records Act is modeled after the Federal Freedom of Information Act.¹⁶⁵ However, the Federal Freedom of Information Act does not include a provision similar to the Public Records

155. *San Gabriel Tribune*, 143 Cal. App. 3d at 774, 192 Cal. Rptr. at 422 (quoting 58 Op. Att'y Gen. 629, 633-34 (1975)).

156. CAL. GOV'T CODE § 6253 (West 1983).

157. CAL. GOV'T CODE §§ 6254.7, 6254.8 (West 1983).

158. CAL. GOV'T CODE § 6254 (West 1983).

159. *In re Estate of Hearst*, 67 Cal. App. 3d 777, 782, 136 Cal. Rptr. 821, 823 (1977) (citing *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 220-22, 71 Cal. Rptr. 193 (1968)).

160. *Id.* at 785, 136 Cal. Rptr. at 826.

161. *Id.*; see *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

162. *CBS, Inc. v. Block*, 160 Cal. App. 3d 866, 207 Cal. Rptr. 65 (1984), hearing granted, L.A. 32029, Jan. 17, 1985.

163. *Id.*

164. *Id.*; see CAL. GOV'T CODE § 6255 (West 1983).

165. 5 U.S.C. § 552 (1977).

Act above, which requires a balancing of these interests.¹⁶⁶ Government code section 6255 provides a balancing test by which records that are not ordinarily exempt under the Public Records Act may be withheld from disclosure, if it is in the public interest to do so.¹⁶⁷

Nondisclosure is in the public interest when the disclosure would expose an individual's personal or financial information,¹⁶⁸ or state secrets,¹⁶⁹ or information retained by governmental agencies.¹⁷⁰ Government Code section 6255 is based on California's common law rule that "public policy demands that certain records should not be open to indiscriminate public inspection, even if they are in the custody of a public official and even if they contain material of a public nature."¹⁷¹

VIII. CONCLUSION

The California Constitution has institutionalized the freedom of speech and of the press in article I, section 2(a). However, these first amendment guarantees are not absolute; they may be regulated.¹⁷² When a person's exercise of first amendment rights infringes upon the rights of another, civil or criminal actions may lie to curtail, prevent, or to punish such infringements.¹⁷³ Accurate generalizations regarding the implementation of the above-stated policy are difficult, but it appears that California's courts and Legislature tend to lean toward the protection of news media when the countervailing interest is primarily a governmental interest. Conversely, when the exercise of "media rights" would tend to infringe on individual rights, the policy of the state seems to favor the protection of the threatened individual rights.¹⁷⁴

One issue which pervades the separate topics surveyed in this

166. *Id.*

167. CAL. GOV'T CODE § 6255 (West 1983).

168. CAL. GOV'T CODE §§ 6254(c), 6254(i) (West 1983).

169. CAL. GOV'T CODE § 6254(f) (West 1983).

170. CAL. GOV'T CODE § 6254(a) (West 1983); *see* CBS, Inc. v. Block, 160 Cal. App. 3d 866, 207 Cal. Rptr. 65, 69 (1984).

171. *Id.*; *see also* City and County of San Francisco v. Superior Court, 38 Cal. 2d 156, 238 P.2d 581 (1951).

172. Horace Hosford v. California State Personnel Bd., 74 Cal. App. 3d 302, 306, 141 Cal. Rptr. 354, 356 (1977).

173. People v. Young, 33 Cal. App. 2d Supp. 747, 85 P.2d 231 (1938), *rev'd on other grnds.*, 308 U.S. 147 (1939).

174. This approach may partially explain California's position on the question of whether to allow cameras in the courtroom during judicial proceedings. On this issue, California's courts—often leaders of reform—have declined even to become followers of what appears to be a clear trend toward increased (and presumptive) media access.

article is likely to be a significant factor in the future development of these areas of the law. It is the question of whether the media are entitled to rights which are greater than those afforded to the general public. The issue is especially pertinent with regard to access. Any analysis of this issue must recall that the rights often referred to as belonging to the media or to the press, are in fact, rights also belonging to the public. While often asserted as a reason for denying the news media greater access than that afforded the general public,¹⁷⁵ this fact is also the media's best argument for special protection and expanded access. California courts have, thus far, refused to accept this argument. However, there is reason to suspect that the United States Supreme Court will eventually grant the media greater right of access.

In *Gannett Co. v. DePasquale*,¹⁷⁶ the United States Supreme Court upheld exclusion of the press and public from a pre-trial hearing concerning the suppression of evidence in a criminal trial. In reaching its conclusion, the Court emphasized that the right to a public trial, as set forth in the sixth amendment, belongs to the accused, and, therefore, cannot be invoked by the press or by the public.¹⁷⁷ The Court acknowledged, but declined to answer, whether the first amendment, as applicable to the states through the fourteenth amendment,¹⁷⁸ affords both public and the press the rights to attend criminal trials.¹⁷⁹

However, in *Richmond Newspapers, Inc. v. Virginia*¹⁸⁰ the Court distinguished *Gannett* as applicable only to pre-trial proceedings, and held succinctly "that the right to attend criminal trials is implicit in the guarantees of the First Amendment."¹⁸¹ Just as a media plaintiff institutionalized and vindicated a public right in *Richmond Newspapers*, the media are uniquely situated to *exercise* certain first amendment rights traditionally belonging to the public. "As a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."¹⁸² The *Richmond Newspapers* case

175. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 11-12 (1978).

176. 443 U.S. 368 (1979).

177. *Id.* at 383-84.

178. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925).

179. *Gannett Co.*, 443 U.S. at 393.

180. 448 U.S. 555 (1980).

181. *Id.* at 580 (footnote omitted).

182. *Id.* at 586 n.2 (Brennan, J., concurring).

also preserved, (albeit in a footnote to a concurring opinion), the "conceptually separate, yet related, question . . . whether the media should enjoy greater access rights than the general public."¹⁸³

If the media are to be effective surrogates for the public with regard to its access, the media must sometimes be treated differently from the public.

If a television reporter is to convey . . . sights and sounds to those who cannot personally visit [a] place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.¹⁸⁴

"News media rights," although derivative, seem destined for increasing institutionalization. This result seems likely, even in light of the current composition and apparent disposition of the United States Supreme Court, which seems to have rejected absolutist approaches to the first amendment in favor of an ad hoc balancing of interests.

183. *Id.*

184. *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (Stewart, J., concurring).